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No. 07-

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN SKELTON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause of the Sixth Amendment guarantees the right to impeach the general credibility of a witness.

2. If so, whether a complete prohibition on asking the government's rebuttal character witnesses "do you know" or "have you heard" questions constitutes a violation of the Confrontation Clause of the Sixth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is John Skelton, defendant-appellant below.

Respondent is the United States.

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OPINIONS BELOW

The opinion below is *United States v. Skelton*, 514 F.2d 433 (5th Cir. 2007). *See* App. at 1. The court of appeals' denied Skelton's timely filed motion for panel rehearing and suggestion for rehearing *en banc*. App. at 29.

STATEMENT OF JURISDICTION

The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 403, Federal Rules Of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue waste of time, or needless presentation of cumulative evidence.

Rule 405(a), Federal Rules Of Evidence

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Rule 608, Federal Rules Of Evidence

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than

conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

STATEMENT OF THE CASE

The indictment alleged that on February 24, 2006, Skelton:

> . . . knowingly and with intent to extort the sum of $300,000.00 from Terry Lee Jacobs, did transmit in interstate commerce from Arkansas to Texas, a telephone communication to the said Terry Lee Jacobs, which telephone communication contained a threat to injure the person of Terry Lee Jacobs, that is, a threat to shoot him, in violation of Title 18 United States Code, Section 875(b). 1R5 (emphasis added).

At trial, the government's position was that on February 24, 2006, Skelton made an unrecorded telephone call from Arkansas to Texas and threatened to have Jacobs shot by law enforcement authorities in Texas if Jacobs did not pay Skelton $300,000.

Skelton's defensive position was that although he called Jacobs on February 24, 2006, he did not threaten to have Jacobs shot. Although the February 24, 2006, call was not tape recorded, Skelton's subsequent conversations with Jacobs on March 10 and 17, 2006, which were tape recorded by Jacobs, do not contain any threat "to shoot" Jacobs and supported his position that Jacobs was fabricating the alleged threat. According to the defense, the reason Skelton had called Jacobs was due to Jacobs' theft of money from a corporation of which he was a partial owner (Jolt, which had two subsidiaries, Mid-Tex and Mid-West). In a nutshell, Skelton was attempting to get Jacobs to do the "right thing" by returning stolen monies to the other three former owners of the corporation, one of whom was a relative of Skelton's who had died of cancer after his company life insurance policy, in the amount of $250,000, had been allowed to lapse by Jacobs due to Jacobs' theft of corporate funds. The manner and means by which Jacobs had stolen from his former partners (as well as from the IRS and the State of Texas) was by maintaining a double set of books. Because of Skelton's allegations of theft leveled against Jacobs in the telephone calls, it was his position that Jacobs had decided to contact the FBI three days after the February 24, 2006,

telephone call and fabricated a "death threat" in order to insulate himself from Skelton's allegations in the event that Skelton really did possess Jacobs' double set of books. Jacobs enlisted the assistance of a co-employee, Victor Lujan, to attempt to bolster his fabrication that Skelton had threatened to shoot Jacobs during the February 24, 2006, conversation.

To prove his defensive position, Skelton called eight fact witnesses to testify to Jacobs' thefts, defalcations, creation and utilization of a double set of books, and that he was the type of person who would falsely point the finger at someone else to protect himself. However, the district court prevented the defense from adducing any of this evidence, thereby forcing the defense to turn those fact witnesses into "bad" character witnesses,[1] testifying that based on

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[1] These eight witnesses testified that based on either their personal opinions and/or what they had heard other people say about Jacobs in the community, Jacobs was not a truthful and honest person. This testimony was properly admissible under Rules 405 and 608(a) of the Federal Rules of Evidence and was part of the defensive position that Jacobs was fabricating his report to the FBI (telling the FBI that Skelton had threatened to have him shot during the February 24, 2006, conversation which formed the indictment offense) in order to protect himself (Jacobs) from the underlying allegations that Skelton made during that unrecorded telephone conversation. Jacobs related Skelton's allegations, at least in part, to the FBI and the Texas Rangers in his initial meeting with them on March 3, 2006, but denied any responsibility and actually blamed a third party as being responsible for the financial plight of the companies and the non-payment of the life insurance premiums on the insurance policy of Skelton's relative. 5R240-242; 253-258.

both reputation and personal knowledge, Jacobs was not a truthful person.[2] In addition to the "bad" character witnesses, Skelton presented the testimony of Shane Towery, who was the person that had informed him of Jacobs' defalcations, had physical possession of Jacobs' double set of books, had actually discussed with Skelton the double set of books, was aware of Skelton's state of mind, and intended course of conduct in calling Jacobs, and who also ultimately turned the double set of books into the IRS at Skelton's request so that the IRS could pursue Jacobs.

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[2] An extensive bill was made regarding what these witnesses would have testified to. 6R198-210. In essence, Skelton was not permitted to show that Jacobs had stolen money from his former partners, had defrauded the IRS and the State of Texas via the creation and utilization of a double set of books, and was the type of person who would make false accusations against others to insulate and protect himself.

Prior to the limitation of the defensive testimony identified above, the district court had also seriously circumscribed Skelton's cross-examination of Jacobs regarding his motive to falsely accuse Skelton due to Skelton's knowledge of Jacobs' defalcations and alleged possession of Jacobs' double set of books.

The court of appeals found the exclusion of the defensive evidence and the limitation on the cross-examination of Jacobs to have been incorrectly analyzed by the trial court, noting that as argued by Skelton, the evidence should have been considered and evaluated as evidence of Jacobs' motive and bias. 514 F.3d at 442; App. at 17. However, the court of appeals found no error or alternatively, that any error was harmless, because Skelton was able to adequately cross-examine Jacobs regarding whether he was lying in order to protect himself and whether he had any assurances from the government that he would not be prosecuted for his alleged misdeeds. 514 F.3d at 443; App. at 19-20.

6R19-34. Again, the district court severely limited Towery's testimony and thus the jury was not allowed to hear the underlying facts necessary to support an argument that Jacobs had a bias against Appellant and a motive to falsely accuse Skelton of threatening him in order to insulate himself if Skelton went to the authorities with the accusations of defalcation.

In rebuttal, the government notified the district court that it wanted to call "good" character witnesses to testify that Jacobs was a truthful person, **but only if the district court prevented Skelton from asking "do you know" or "have you heard" questions** of those rebuttal "good" character witnesses. 6R86-97. After a hearing, during which Skelton asserted that the Fifth and Sixth Amendments mandated that he be permitted to cross-examine any "good" witnesses called by the government with "do you know" or "have you heard" questions (depending upon whether they testified based on "reputation" or "personal opinion") in order to test their basis of knowledge, 6R87-97, the district court granted the government's request and ruled that Skelton could not cross-examine the government's rebuttal "good" character witnesses with "do you know" or "have you heard" questions. Rather, the district court instructed Skelton to cross-examine the government's rebuttal "good" character witnesses by asking the following question:

> **"would your opinion change if [insert the name of Skelton's "bad" reputation witness], who was formerly employed**

> **by Midwest and MidTex, had an opinion that he [Mr. Jacobs] was not truthful and [he or she] believed his reputation was not truthful.**" (explanation added)

6R91, L. 12-15. The district court based its ruling on a belief that because Jacobs was a "victim," he was entitled to different treatment than a defendant and specific acts of misconduct would not be permissible to cross-examine the government's rebuttal "good" character witnesses under Rules 404, 405 and 608(b). 6R95-96. The district court so ruled despite its acknowledgement that the critical conversation between Skelton and Jacobs had not been recorded and that "there's no question that Mr. Jacobs' credibility is on trial. I mean, obviously, that part, his credibility, is essential to the government's case." 6R91, L. 20-22. Skelton reiterated that once the government put a "good" character witness on the stand, then under this Court's opinion in *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the cross-examiner should be allowed to test the basis of that witness' knowledge by asking either "do you know" or "have you heard" questions, depending upon whether the witness was testifying on the basis of reputation or personal opinion, 6R92, and that the questions posed to the character witness were appropriate to ascertain whether the character witness "has either heard or is aware of specific instances of traits of and acts of dishonesty, things that are inconsistent" with good character for truth and veracity. 6R94, L. 4-13. Skelton reiterated that the proposed "do you know" or "have you heard" questions were

appropriate under *Michelson* because Skelton had the right to confront the government's rebuttal "good" character witnesses and "test their basis of knowledge and whether – if they had heard this or if they knew this, it would affect their opinion." 6R94, L. 18-25. Skelton also reiterated that the type of "cross-examination" that the district court had ruled would be allowed, as set forth above, was insufficient to test the basis of knowledge of the government's rebuttal "good" character witnesses, in violation of his Sixth Amendment right to confront and cross-examine and to present a defense. 6R97, L. 9-18.[3] Nevertheless, over Skelton's strenuous objections, the district court ruled that Skelton would not be allowed to ask "do you know" or "have you heard" questions of the government's rebuttal character witnesses and thus eliminated the only line of meaningful

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[3] The district court authorized Skelton to make a bill or proffer of the questions he would have asked, but for the court's ruling. 6R97. That bill or proffer is reflected at 6R198-210 and is also reflected in Def. Exh. 2, and consists of seventeen potential "do you know" and "have you heard" questions that the defense had contemplated asking of the government's rebuttal character witnesses, although Skelton informed the district court that it would not have asked each of the five rebuttal character witnesses all of the seventeen questions. 6R198-201; 207-210. The government affirmed that the bill or proffer was made in correct form and that it had no basis to contest the "good faith" of any of the questions Skelton would have asked of the government's five rebuttal character witnesses. 6R210.

cross-examination of those rebuttal character witnesses. 6R86-97.[4]

After less than one and one-half days of testimony, the jury received the case. After deliberating almost two hours, the jury submitted the following note:

> "According to 18 USC Section 875(b), does 'threat to Injure a person' mean we have to believe beyond a reasonable doubt **that there was a threat to shoot or physical injury in general.**"[5]

After the district court referred the jury back to the jury instructions,[6] the jury convicted after a total

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[4] Despite the limitation imposed by the district court – requiring Skelton to ask the question quoted above in bold – the district court was even more restrictive, sustaining the government's objection to the following question posed to one of the government's rebuttal character witnesses (Herbert Willis):

> If you had spoken to those individuals (list of defense "bad reputation" witnesses) and were made aware of what they personally know, do you think that would affect your opinion today? (explanation added).

6R128. Accordingly, there was no meaningful cross-examination of the government's five "good" character rebuttal witnesses.

[5] Skelton's position was that this note reflected the jury's doubts about Jacobs' veracity – i.e., Jacobs' claim that Skelton threatened to have him shot during the unrecorded conversation on February 24, 2006, a claim which the government labeled a "death threat" during its opening statement. 5R36, L. 8-18.

[6] The district court's action in this regard was raised on appeal, but the court of appeals rejected Skelton's argument that

(Continued on following page)

of almost four hours of deliberations. Skelton was ultimately sentenced to 50 months confinement and a $5,000 fine. 1R239; 7R41.

On appeal, Skelton asserted that the district court's limitation on his cross-examination of the government's five rebuttal character witnesses – prohibiting "do you know" and/or "have you heard" questions designed to test their basis of knowledge, as specifically authorized by Rule 608(b) of the Federal Rules of Evidence – violated Skelton's Sixth Amendment rights to confrontation and cross-examination and to present a complete defense.

The court of appeals noted a host of authority to the effect that Rule 608(b) permits inquiry on cross-examination into specific instances of conduct which may bear on a witness' credibility in order to impeach the credibility of the witness, subject to two requirements. 514 F.3d at 443-44; App. at 21. Those restrictions are "'[f]irst, the alleged bad act must have a basis in fact and second, the incidents inquired about must be relevant to the character traits at issue in the trial.' *United States v. Nixon*, 777 F.2d 958, 970 (5th Cir. 1985) (citing *Michelson v. United States*, 335 U.S. 469, 481 n. 18, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *United States v. Crippen*, 570 F.2d 535, 538-39 (5th Cir. 1978)." The court of appeals also recognized that a district court has "substantial discretion"

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the response should have specifically instructed the jury to find a "threat to shoot." 514 F.3d at 445-46; App. at 27.

to determine the admissibility of character evidence under Rule 608(b) and that, even if character evidence is determined to be admissible, a district court can exclude it under Rule 403 if the prejudicial effect outweighs its probative value. 514 F.3d at 444; App. at 21.

The court of appeals acknowledged that the district court had "stated that Rule 608(b), when read in conjunction with Rules 404 and 405, applies differently to third-party witnesses, implying that Rule 608(b) somehow bars Skelton from inquiring into specific instances of conduct to test the reliability of the Government's rebuttal character witnesses." 514 F.3d at 444; App. at 22. The court of appeals then stated:

> In doing so, the district court erred. This court has explained that "[o]nce a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony." *United States v. Wells,* 525 F.2d 974, 976 (5th Cir. 1976) (citing *Michelson,* 335 U.S. at 479, 69 S.Ct. 213); *see also Bright,* 588 F.2d at 511-12. We see no reason why this Rule would apply differently to rebuttal character witnesses testifying about the character of other third-party witnesses.

514 F.3d 444; App. at 22.

The court of appeals specifically noted that "three major treatises on evidence agree that Rule 608(b) permits a party to inquire into specific instances of conduct to test the reliability of a rebuttal character witness in such situations," citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 608.23, at 68 (2d ed. 2007); 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:41, at 266-68 (3d ed. 2007); 2 Michael H. Graham, Handbook of Federal Evidence § 608.5, at 622-25 (6th ed. 2006). 514 F.3d at 444; App. at 22-23. The court then cited the following explanation for this rule from Handbook of Federal Evidence § 608.5, at 622-25:

> The character witness may be asked not only concerning the specific acts of the principal witness probative of truthfulness or untruthfulness, but may be cross-examined concerning familiarity with convictions as well as arrests, rumors, reports, indictments, etc., of the principal witness. Such facts have a natural bearing upon the reputation of the principal witness and the character witness' opinion of the principal witness. **Lack of familiarity with such facts is relevant to an assessment of the basis for the character witness' testimony. Familiarity with such matters explores the character witness' standard of "truthfulness" or "untruthfulness."** Whatever the form of the question, the cross-examiner must, of

> course, have a good faith basis supporting his inquiry.

514 F.3d at 444-45 (emphasis added).

After reiterating that the district court "erred" by prohibiting "did you know" or "have you heard" questions regarding specific instances of conduct of Jacobs. 514 F.3d at 445; App. at 23, the court engaged in the following analysis as the totality of its consideration of Skelton's Sixth Amendment violation:

> Nonetheless, this court has held that although Rule 608 permits the impeachment of the general credibility of a witness, **there is no constitutional right to do so**. *See Cloud v. Thomas,* 627 F.2d 742, 743-44 (5th Cir.1980). **Thus, based on this court's precedent, the district court's error does not implicate the Confrontation Clause.**[FN7]
>
> > FN7. Skelton also argues that the district court's evidentiary rulings violated his right to present a complete defense. The Supreme Court has stated that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina,*

> 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). For the same reasons we find no violation of Skelton's confrontation right, we likewise conclude that the district court's evidentiary rulings provided Skelton with a meaningful opportunity to present a complete defense and that any error is harmless beyond a reasonable doubt.

514 F.3d at 445; App. at 23-24 (emphasis added).[7]

REASONS FOR GRANTING THE WRIT

This Court's Confrontation Clause cases fall into two broad categories: (1) cases involving the admission of out-of-court statements; and (2) cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S.Ct. 292, 88 L.Ed.2d 15

[7] After concluding that there was no Confrontation Clause violation, the court of appeals failed to conduct a harm analysis under Rule 52(a), Federal Rules of Criminal Procedure, to determine whether the district court's error affected Skelton's substantial rights. Under *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the total prohibition on cross-examination certainly had a "substantial and injurious effect or influence" on the jury.

(1985). Skelton's case falls clearly into this second category because the trial court imposed a total prohibition on asking the government's rebuttal character witnesses "do you know" or "have you heard" questions.

As demonstrated below, the trial court's restriction on Skelton's right to confront and cross-examine the government's rebuttal character witnesses: (1) is inconsistent with this Court's prior interpretation of the Confrontation Clause; (2) is contrary to this Court's opinion in *Michelson*; (3) is clearly based on an incorrect reading of Rule 608(b) of the Federal Rules of Evidence; (4) is contrary to three major treaties on evidence; and (5) totally emasculated Skelton's opportunity to elicit answers to "do you know" and/or "have you heard" questions relevant to an assessment of the basis of the testimony of the government's rebuttal character witnesses. The holding of the court of appeals that there was no Sixth Amendment violation because there is "no constitutional right" to "impeachment of the general credibility of a witness" merits review by this Court.

1. The Decision Below Sanctions An Unjustified And Arbitrary Limitation On Cross-Examination That Cannot Be Reconciled With This Court's Prior Opinions.

As noted above, the Court's prior Confrontation Clause cases fall into two categories. According to *Delaware v. Fensterer*:

> The second category of cases is exemplified by *Davis v. Alaska,* 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in *Davis, supra,* at 315, 94 S.Ct., at 1110, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in *Davis,* as in other cases involving trial court restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "**effectively ... emasculate the right of cross-examination itself.**" *Smith v. Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

474 U.S. at 19 (emphasis added).

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), is particularly applicable to Skelton because:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, **the cross-examiner is not only permitted to delve into the witness'**

> **story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . .**

Davis, 415 U.S., at 315 (internal quotations marks and citations omitted) (emphasis added).

While *Davis* recognized that cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness" is a "more particular attack on the witness' credibility," *Davis*, 415 U.S., at 315, the "right to impeach, i.e., discredit, the witness" has never been held to include merely bias.[8] *See Alford v. United States*, 282 U.S. 687, 691-92, 51 S.Ct. 218, 75 L.Ed.2d 624 (1931) (noting that "permissible purposes" of cross-examination includes, but is not limited to, identifying the witness with his community, and bringing out of facts "tending to discredit the witness by showing that his testimony in chief was untrue or biased"); *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956

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[8] Cases in support of allowing cross-examination for bias include *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (black defendant's denial of cross-examination of white complaining witness on her co-habitation with black boyfriend relevant to possible motive for complaint to falsely accuse defendant of sexual assault constituted Confrontation Clause violation) and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 674 (1986) (denial of cross-examination of witness with possible bias in favor of state due to dismissal of pending criminal charge constituted Confrontation Clause violation).

(1968) (Confrontation Clause includes the right to cross-examine witness on actual name and address where credibility of witness is in issue). The right to cross-examination also includes "the opportunity to show . . . that the testimony is exaggerated or unbelievable." *Pennsylvania v. Richie*, 480 U.S. 39, 51-52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). And while "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," *Delaware v. Fensterer,* 474 U.S., at 20 (emphasis in original), no prior case from this Court **limits the mode of impeachment** that is within the scope of the Confrontation Clause.[9]

Impeachment of a witness can involve many different modes of attack. According to 1 McCormick On Evidence § 33 (6th ed. 2006):

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[9] In *Portundo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), the Court upheld as constitutional the government's argument that the defendant, having testified at his trial, had an opportunity to tailor his testimony to fit that given by other witnesses who testified in his presence. The Court concluded that such an argument was consistent with an adversarial system, which must permit opposing parties to test the credibility of all testifying witnesses. *See also Jenkins v. Anderson*, 447 U.S. 231, 235-36, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) ("Once a defendant takes the witness stand, he is "'subject to cross-examination impeaching his credibility just like any other witness.'") (quoting *Grunewald v. United States*, 353 U.S. 391, 420, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957)).

There are **five main modes of attack upon a witness's credibility**.[FN5] The **first**, and probably most frequently employed, is self contradiction. That technique consists of proof that the witness on a previous occasion has made statements inconsistent with his present testimony. The **second** is an attack showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt. The **third** is an attack on the witness's character, but lack of religious belief is not available as a basis of attack on credibility. The **fourth** is an attack showing a defect of the witness's capacity to observe, remember, or recount the matters testified about. The **fifth** is specific contradiction, that is, proof by other witnesses that material facts are otherwise than as testified to by the witness being impeached. [footnote omitted] Some of these attacks such as bias are not specifically or completely treated by the Federal or Revised Uniform Rules of Evidence, but nevertheless they are authorized by those rules. Article VI of the Federal Rules contains several provisions expressly regulating impeachment techniques such as proof of prior inconsistent statements, and the proof of other facts logically relevant to witness credibility is governed by the general analytic framework set out in Federal Rules 401 to 403.

> [FN5] Credibility is dependent on the witness's willingness to tell the

> truth and his ability to do so. In turn, his ability to tell the truth as to an event of which he purports to possess personal knowledge is the product of his physical and mental capacity, actual employment of the capacity to perceive, record, and recollect, and his ability to narrate. **Impeachment of a witness may be directed to one or more components of credibility. Thus the objective being pursued in any given situation may be to draw into question the accuracy of the witness's perception, recordation, recollection, narration, or sincerity**. Tribe, Triangulating Hearsay, 87 Harv.L.Rev. 957 (1974); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484 (1937). . . . **In assessing the witness's credibility, the trier of fact looks not only to the content of the witness's testimony on direct and his answers to questions on cross-examination, the trier of fact also assesses the witness's demeanor**.

(emphasis added).

Davis' clear approval of the right to impeach – discredit – a witness cannot be reconciled with the

court of appeals' opinion that there is no "constitutional right" to "impeach the general credibility of a witness" and that therefore, there was no constitutional violation from the complete prohibition of "do you know" and "have you heard" questions. Indeed, the court of appeals opinion in totally inconsistent with this Court's Confrontation Clause cases. The complete prohibition on asking the government's rebuttal character witnesses "do you know" or "have you heard" questions eliminated the main mode of attacking the opinion of the government's rebuttal character witnesses: the testing of those opinions with good faith "do you know" or "have you heard" questions which, depending upon the answers, might well have allowed Skelton to have obtained on cross-examination a retraction of the opinions or at the very least, provided a meaningful basis for the jurors to have judged the credibility and reliability of the rebuttal character witnesses' opinion testimony (depending upon what the character witness might have known and/or heard about Jacobs).

The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities in the witness' direct testimony through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. *Delaware v. Fensterer,* 474 U.S., at 20. However, a total prohibition on the well established mode of attacking a character witness eliminates the ability to meaningfully cross-examine the character witness, in violation

of the Sixth Amendment. As such, the opinion of the court of appeals sanctions an unjustified and arbitrary limitation on cross-examination that cannot be reconciled with this Court's prior opinions.

2. The Decision Below Is Contrary To The Court's Opinion In *Michelson v. United States.*

In *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the Court addressed the government's right to cross-examine a defensive character witness with questions designed to test the character witness' basis of knowledge and upheld the propriety of the government's question "[d]id you ever hear that on October 12, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?" Although *Michelson* predated the adoption of the Federal Rules of Evidence, Rules 405 and 608(b), both of which are quoted above, specifically contemplate and authorize Skelton's cross-examination with his proposed good faith "do you know" and/or "have you heard" questions. *Cf. United States v. Abel*, 469 U.S. 45, at 49-51, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (noting that the Federal Rules of Evidence "do not by their terms deal with impeachment for 'bias,' although they do expressly treat impeachment by character evidence and conduct, Rule 608, by evidence of conviction of a crime, Rule 609, and by showing of religious beliefs or opinion, Rule 610," and also noting that cross-examination "on 'matters

affecting credibility of the witness'" is authorized by Rule 611(b)).[10] While it has been almost sixty years since the Court last addressed the topic of the proper scope of cross-examination of character witnesses in *Michelson*, the holding of *Michelson* has been incorporated into Rules 405(a) and 608. The action of the district court herein, despite citation by Skelton of *Michelson* and reliance upon Rules 405(a) and 608, was erroneous and devoid of any legal justification, as found by the court of appeals. Nevertheless, the conclusion of the court of appeals that the Confrontation Clause was not implicated by the trial court's action because there is "no constitutional right" to "impeachment of the general credibility of a witness" flies in the face of *Michelson*.

3. This Case Is An Excellent Vehicle For Considering The Questions Presented.

A more clear cut factual scenario could not exist, thus making this case an excellent vehicle for considering whether such a total prohibition violates the Confrontation Clause given the court of appeals' conclusion that there is no "constitutional right" to "impeachment of the general credibility of a witness." Given the various modes of impeaching a witness recognized by McCormick, *supra*, the court of appeals'

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[10] In *Abel*, the Court reversed the court of appeals which had held that the government's admission of rebuttal testimony showing membership in a prison gang was improper to show the witness' possible bias in favor of the defendant.

conclusion that there is no "constitutional right" to "impeachment of the general credibility of a witness" effectively eliminates the "**third mode**" – an attack on the witness's credibility – from the umbrella of Confrontation Clause protection. Exactly how and why any one of the five recognized modes of impeachment can be excluded from Confrontation Clause protection, as effectively mandated by the opinion of the court of appeals herein, is unclear and merits this Court's consideration. Having voluntarily taken the witness stand at the government's request, the rebuttal character witnesses were under an obligation to speak truthfully and accurately, and all Skelton was attempting to do was to "utilize the traditional truth-testing devices of the adversary process." *Harris v. United States*, 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed. 1 (1971). The arbitrary denial of the "traditional truth-testing device" of "do you know" or "have you heard" questions – also expressly sanctioned by Rules 405 and 608 of the Federal Rules of Evidence – violated the Confrontation Clause of the Sixth Amendment.

4. The Court Of Appeals' Reliance Upon *Cloud v. Thomas* For Its Conclusion That There Is No Constitutional Right To "Impeachment Of The General Credibility Of A Witness" Perpetuates A Dangerous Precedent That Justifies The Court's Review.

The court of appeals reliance upon *Cloud v. Thomas*, 627 F.2d 742, 743-44 (5th Cir. 1980), *cert.*

denied, 450 U.S. 1041, 101 S.Ct. 1760, 68 L.Ed.2d 239 (1981), perpetuates a dangerous precedent. In *Cloud*, the district court refused to permit the defendant to attack the credibility of the sole witness against the defendant by showing that the witness had filed a false report in an unrelated vice undercover operation which resulted in his being sanctioned and demoted. In affirming the denial of habeas corpus, the court of appeals implied that the Sixth Amendment does not require admission of all character evidence of whatever relevance and probative value. *Id.* at 241. While Skelton does not disagree with the result in *Cloud*, the broad language seized upon by the court of appeals in Skelton to conclude that the total prohibition on asking "do you know" or "have you heard" questions did not violate the Confrontation Clause perpetuates *Cloud*, which has been relied upon from time to time by the courts of appeals. *See, e.g.*, *United States v. Rocha*, 916 F.2d 219, 242 (5th Cir. 1990) (relying on *Cloud* to uphold limitation on cross-examination of witness on whether he included income from cocaine sales in his tax returns); *United States v. Davis*, 639 F.2d 239, 244 (5th Cir. 1981) (distinguishing *Cloud* by noting that in *Davis*, the excluded evidence would have established that the witness' reputation for truth and veracity was bad, whereas in *Cloud*, the excluded evidence was a single specific instance of misconduct); *United States v. Brown*, 634 F.2d 819, 824 (5th Cir. 1981) (stating that *Cloud* established that the Sixth Amendment does not guarantee a defendant the right to inquire on cross-examination into incidents which would

impeach the witness's general propensity for truthfulness, but not reaching the issue raised therein due to a lack of prejudice); *United States v. Piche*, 981 F.2d 707, 714 (4th Cir. 1992) (noting that *Cloud* established no Sixth Amendment right to admit evidence that a witness lied before to show that he may have lied at trial, and citing contrary authority).[11]

5. The Court Of Appeals So Far Departs From The Usual Course Of Judicial Proceedings, And Sanctions Such A Departure By The Lower Court, As To Call For An Exercise Of This Court's Supervisory Powers.

The Court's supervisory powers over the court of appeals is unquestionable. *Carlisle v. United States*, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996). Given the opinion of the court of appeals – including but not limited to its failure to address whether the total prohibition was harmful error under Rule 52(a), Federal Rules of Criminal Procedure – the Court should not hesitate to exercise its supervisory powers. *See United States v. Hale*, 422 U.S. 171, 180-81, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975);

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[11] In *Piche*, the court of appeals cited *United States v. Beros*, 833 F.2d 455, 463-64 (3rd Cir. 1992) as contrary authority because in *Beros*, the court upheld the admission of credibility evidence that the defendant had lied about his martial status in a sworn statement "given the magnitude of the attempted falsehood."

Stewart v. United States, 366 U.S. 1, 5, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961); *Grunewald v. United States*, 353 U.S., at 424 (relying upon supervisory powers to reach issues including impeachment of a defendant with prior silence or assertion of Fifth Amendment rights). Indeed, the inability to test the basis for the rebuttal character witnesses' testimony and to attempt to meaningfully ascertain whether any one or more of them might have qualified their opinion of Jacobs' truthfulness when posed with "do you know" and "have you heard" questions undermined the reliability of their testimony, affecting Skelton's substantial rights. Nevertheless, the court of appeals failed to address this standard of harm after concluding that the district court's error did not rise to the level of a Confrontation Clause violation. This is a clear departure from the usual course of judicial proceedings sufficient to justify an exercise of the Court's supervisory powers.

CONCLUSION

WHEREUPON, PREMISES CONSIDERED, Petitioner prays that this Court grant the petition for writ of certiorari.

Respectfully submitted,

DAVID L. BOTSFORD
Counsel Of Record

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

06-51528

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN C. SKELTON

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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(Filed Jan. 17, 2008)

Before KING, BARKSDALE and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

The primary issue in this criminal case is whether the district court's limitations on cross-examination violated the defendant's Sixth Amendment confrontation right and right to present a complete defense. After careful review of the district court's evidentiary rulings, we affirm the defendant's conviction.

I. BACKGROUND

John C. Skelton, Defendant, was indicted on one count for violating 18 U.S.C. § 875(b).[1] According to the trial testimony, sometime prior to February 24, 2006, Skelton called Terry Jacobs and had a short conversation regarding Slim Gabrel. Skelton hung up the phone because of a poor connection. On February 24, 2006, Skelton again called Jacobs. Skelton confirmed that he had called before and stated that "Slim Gabrel wants his money. He said you [Jacobs] stole your partner's money and didn't pay his life insurance. And Slim is going to get a percentage of that, what you stole." Jacobs stated that he did not steal anything and that he did not even know a Slim Gabrel. Skelton responded that he had seen the books, that Jacobs had indeed stolen money, and that although Slim Gabrel used to be a sheriff, he was now head of the West Texas Mafia. Jacobs stated that he did not know what Skelton was talking about to which Skelton responded that if he did not get the money, Jacobs would be murdered. Skelton explained that he had connections with the Ector County and Midland County Sheriff's Offices and that "[t]he way

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[1] 18 U.S.C. § 875(b) provides:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

it's going to happen is, you're going to get stopped by a county patrol unit . . . and they're going to arrest you, put handcuffs on you, put you in the back seat, take you out in the country and shoot you in the head." Skelton also stated that "Slim wanted . . . me to go ahead and just kill you and collect the money from your wife . . . I don't think I'll do that . . . I'll just collect it from you, but I think it would be easier to collect it from your wife." Skelton instructed Jacobs to obtain two cashiers checks, one for $250,000 and the other for $50,000. The conversation ended with Skelton telling Jacobs that he would be in touch.

During the conversation, Jacobs was sitting next to his coworker, Victor Lujan, in an office building in Midland, Texas – Skelton made the call from Arkansas. Lujan testified that during the conversation, Jacobs suddenly started shaking, his breathing patterns changed, and he became very nervous. At some point, Jacobs handed the phone to Lujan, who testified that he heard the caller state that if Jacobs "didn't pay the money a city cop was actually going to pull him over [and] was going to handcuff him and shoot him."

On February 27 or 28, 2006, Jacobs spoke with Special Agent Dina Morales, who filled out a complaint reflecting that Jacobs had received a threatening phone call. She referred the case over to Texas Ranger Jess Malone. Malone and Morales ascertained the identity of the caller to be Skelton through phone

records.[2] They met with Jacobs on March 3, 2006 and advised him to obtain a recording device in the event that Skelton called again. They also asked Jacobs if he suspected a motive for the calls. Jacobs explained that he had once worked for a company called Jolt Corporation ("Jolt"), which was formed in the early 1990's to purchase two companies, Hardrock (d/b/a MidTexas Construction) and Midwest Equipment. Jacobs was vice-president of Jolt, which eventually dissolved in 1999. He denied stealing money from the company but indicated that Jolt had failed to make payments on a life insurance policy on one of its co-owners, Don Towery, who died in 1999.[3] He believed that these were the events referred to by Skelton during their phone conversation.

On March 10, 2006, Skelton again called Jacobs and demanded he pay back the life insurance money. When Jacobs informed him that he did not have that kind of money, Skelton responded that there would be trouble. Skelton also stated, "And you're either gonna give that money back or I'm gonna deal with your ass, boy." During the call, Skelton indicated that he was aware that Jacobs maintained a double set of books, that he had stolen the insurance premiums when Towery was dying of cancer, and that he would "call the income tax people showing you [Jacobs] stole the federal FICA." At that point, Jacobs hung up the

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[2] Deborah Middleton, a telecommunications specialist, testified with respect to these records at trial.

[3] Skelton and Don Towery were cousins.

phone, indicating on his recording device that he was nervous. During the next few weeks, Jacobs called Skelton – at the urging of Morales and Malone – in an attempt to get Skelton to threaten him again. However, Skelton made no further threats. He did at one point explain that he never wanted the money for himself; he only wanted Skelton to repay the previous co-owners of Jolt.

At trial, the district court did not permit defense counsel to ask Jacobs on cross-examination if he was only testifying to win favor with the Government in the event that the IRS investigates Jolt's financial books. The district court also denied Skelton's request to present extrinsic evidence that Jacobs was lying about stealing money from Jolt. However, the district court did allow some cross-examination regarding Jacobs prior dealings with Jolt. To that end, Jacobs testified that Towery's life insurance policy had lapsed because Jolt did not pay the premiums. He also testified that one of the companies owned by Jolt suffered a financial decline because Joe Moscarro, another co-owner, stole money from the company.[4] Defense counsel also asked Jacobs, "Isn't it a fact that you hung up within a second of [Skelton] mentioning the federal FICA so that the agents that were going to hear this tape wouldn't learn about that?" Jacobs responded, "No." He also denied that the "reason that

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[4] SA Morales testified that there was proof that Moscarro had stolen money from one of the companies owned by Jolt.

[he] sounded more nervous at that time is because of this reference to FICA."

After the Government rested, Skelton moved for judgment of acquittal. The district court denied the motion. Skelton then called eight witnesses – Shane Towery, Mary Ann Stephens, Sharon Miller, Tina Kennedy, Mildred Lipham, Johnny Oldham, Beverly Brock, and Lance Hall – all of whom either worked for or were somehow associated with companies owned by Jolt. Each testified that Jacobs was not a truthful person and had the reputation for being untruthful. The district court did not permit these witnesses to testify about the allegations that Jacobs stole funds from Jolt and lied to the IRS.

During a break in the testimony, the parties presented arguments regarding the admissibility of rebuttal character testimony regarding Jacobs. Skelton maintained that he was entitled to ask the Government's rebuttal character witnesses "did you know" or "have you heard" questions involving specific alleged acts of dishonesty. The district court agreed that Skelton was entitled to ask such questions as: "Did you know Lance Hall, who was the brother-in-law of Shane Towery and the son-in-law of Mr. Towery, had an opinion that he thinks [Jacobs] wasn't truthful," but that Skelton was *not* entitled to pose such questions as: "Do you know or have you heard that Sharon Miller, who worked for Mr. Jacobs, showed Shane Towery a double set of books that had been maintained by Mr. Jacobs." Skelton argued that prohibiting him from asking such "did you know" or

"have you heard" questions violated his confrontation right. The district court responded that it was following Rules 404, 405, and 608 of the Federal Rules of Evidence meticulously and overruled the objections. The Government proceeded to call five rebuttal witnesses – Beau Estes, Jeff Neely, Mark Bergen, Stephen Castle, and Butch Willis – all of whom testified that they knew Jacobs and that he was a truthful person. Skelton was not permitted on cross-examination to ask "did you know" or "have you heard" questions regarding specific alleged acts of dishonesty.

After the defense and the Government rested, Skelton renewed his motion for judgment of acquittal. The district court denied the motion. After two hours of deliberation, the jury sent the following note to the district court: "According to 18, U.S.C., Section 875(b), does 'threat to injure a person' mean we have to believe beyond a reasonable doubt that there was a threat to shoot or physical injury in general?" The district court heard arguments on the issue. The Government argued that the district court should simply refer the jury to the instructions concerning the elements of the offense. Skelton argued that the district court should give the jury a specific instruction that the Government had to prove beyond a reasonable doubt that there was a threat to shoot Jacobs. The district court submitted the following response, "In response to Jury Note 1, you are referred back to the Court's Instructions to the Jury." The jury returned a verdict of guilty and Skelton was

sentenced to 50 months imprisonment, three years of supervised release, and a $5,000 fine. He filed a timely notice of appeal.

II. STANDARDS OF REVIEW

We review alleged violations of a defendant's Sixth Amendment confrontation right *de novo*. *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004). We also review alleged violations of a defendant's Sixth Amendment right to present a complete defense *de novo*. *See United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005) (citing *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005)); *see also United States v. Soape*, 169 F.3d 257, 270 (5th Cir. 1999) ("We review . . . constitutional questions *de novo*."). Such claims, however, are subject to harmless error review. *Bell*, 367 F.3d at 465; *see also United States v. Jimenez*, 464 F.3d 555, 558 (5th Cir. 2006). If there is no constitutional violation, then we review a district court's limitations on cross-examination for an abuse of discretion, which requires a showing that the limitations were clearly prejudicial. *Jimenez*, 464 F.3d at 558-59 (citing *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993)). Finally, we review the refusal to give a defense-tendered jury instruction for abuse of discretion. *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993).

III. ANALYSIS

A. Cross-Examination of Jacobs

Skelton argues that the district court erred in limiting his ability to cross-examine Jacobs and otherwise present evidence regarding the allegations that Jacobs stole from Jolt and lied to the IRS. "While the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Elliott,* 571 F.2d 880, 908 (5th Cir. 1978).[5] As the Supreme Court has emphasized:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives

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[5] The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

> of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308, 315 (1974) (internal quotations marks and citations omitted). This right "is particularly important when the witness is critical to the prosecution's case." *Jimenez,* 464 F.3d at 559 (quoting *United States v. Mizell,* 88 F.3d 288, 293 (5th Cir. 1996)). However, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original); *see also Bigby v. Dretke,* 402 F.3d 551, 573 (5th Cir. 2005) ("[T]he Confrontation Clause does not guarantee defendants cross-examination to whatever extent they desire."). The district court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986). Thus, the Confrontation Clause

is generally satisfied when the defendant has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Restivo,* 8 F.3d at 278 (quoting *Davis,* 415 U.S. at 318); *see also United States v. Tansley,* 986 F.2d 880, 886 (5th Cir. 1993) ("The relevant inquiry is whether the jury had sufficient information to appraise the bias and motives of the witness.").

In order to establish a violation of the confrontation right, the defendant need not establish that the jury would have reached a different result. *Van Arsdall,* 475 U.S. at 679-80. Instead, the focus is on the particular witness. *Id.* at 680. As the Supreme Court explained, "[i]t would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict." *Id.* Thus, to establish a violation of the confrontation right, the defendant need only establish that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." *Id.* Finally, any violation of the confrontation right is subject to harmless error review by analyzing the following factors: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence

or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall,* 475 U.S. at 684.

The determination of "[w]hether the exclusion of evidence is of a constitutional dimension depends on the [district] court's reason for the exclusion and the effect of the exclusion." *Kittelson v. Dretke,* 426 F.3d 306, 319 (5th Cir. 2005). This determination typically includes an inquiry into the admissibility of the evidence under the Federal Rules of Evidence.

Skelton first argues that any evidence relating to the allegations that Jacobs stole funds from Jolt and lied to the IRS is admissible as intrinsic "other act" evidence. "'Other act' evidence is 'intrinsic' when the evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *United States v. Coleman,* 78 F.3d 154, 156 (5th Cir. 1996) (quoting *United States v. Williams,* 900 F.2d 823, 825 (5th Cir. 1990)). "This evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place." *Id.* (citing *United States v. Kloock,* 652 F.2d 492, 494-95 (5th Cir. 1981); *United States v. Royal,* 972 F.2d 643, 647 (5th Cir. 1992)). Intrinsic "other act" evidence does not implicate Rule 404(b) of the Federal Rules of Evidence and "consideration of its admissibility

pursuant to Rule 404(b) is unnecessary." *United States v. Garcia,* 27 F.3d 1009, 1014 (5th Cir. 1994).

We agree with the Government that the "other act" evidence at issue is not intrinsic. Indeed, whether Jacobs stole money from Jolt and lied to the IRS is irrelevant to the question of whether Skelton threatened Jacobs, especially given that the Government need not establish a motive for the alleged threat. As the district court correctly recognized, "Let's say all that was true. . . . Does that give your client the right to threaten to kill him?" Because the issue of whether Jacobs committed these other alleged acts is not a requisite preliminary or otherwise necessary to complete the story of the crime charged, we conclude that evidence of these other alleged acts is not admissible as intrinsic "other act" evidence. *Coleman,* 78 F.3d at 156; *Williams,* 900 F.2d at 825.

None of the cases cited by Skelton compels a different result. Indeed, in each of these cases, the other act at issue consisted of a crime committed *by the defendant* that was inextricably intertwined with the offense charged. *See, e.g., United States v. Smith,* 930 F.2d 1081, 1087 (5th Cir. 1991) (finding no error when district court admitted drug-related testimony regarding defendant); *Coleman,* 78 F.3d at 156-57 (finding no error when district court admitted evidence that defendant attempted to carjack another vehicle shortly before car-jacking victim); *United States v. Lamp,* 779 F.2d 1088, 1095 (5th Cir. 1986) (finding no error when district court admitted evidence of defendant's drug trafficking offenses to show

nature and extent of income in tax fraud case); *United States v. Price,* 877 F.2d 334, 337 (5th Cir. 1989) (finding no error when district court admitted relevant recordings of conversations in which defendant discussed other crimes he committed). Thus, Skelton has not cited any case in which another act committed *by a witness* was somehow deemed inextricably intertwined with the offense charged.

The parties next debate whether evidence relating to the allegations that Jacobs stole funds from Jolt and lied to the IRS is admissible under Rules 404(b) and 608(b) of the Federal Rules of Evidence. However, we find both parties to be mistaken in their analysis and conclude that neither Rule applies. The Government first argues that Rule 404(b) bars the admissibility of any evidence relating to the allegations that Jacobs stole funds from Jolt and lied to the IRS. That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).[6] We find that Rule 404(b) does not bar the evidence at issue because it is not being offered as character evidence to show action in conformity therewith. Contrary to the Government's argument, Skelton is not arguing that because Jacobs allegedly stole funds from Jolt and lied to the IRS, he has a propensity to lie *generally*. Instead, he is offering this evidence to show that Jacobs has a motive to lie about the alleged threat in this case, *i.e.*, to divert attention from his own alleged misdeeds and win favor with the Government. Because Skelton is essentially introducing this evidence as evidence of bias, Rule 404(b) does not bar its admissibility.

Nor does Rule 608(b) apply. That Rule provides, in pertinent part, that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." Fed. R.

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[6] To determine the admissibility of evidence under Rule 404(b), this court employs the two-part *Beechum* test. *United States v. Sumlin*, 489 F.3d 683, 690 (5th Cir. 2007) (citing *Beechum v. United States*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)). First, the court determines whether the act is relevant to an issue other than character. *Beechum*, 582 F.2d at 911. This inquiry includes a determination of whether there is sufficient evidence to demonstrate that the witness actually committed the offense. *Id.* at 912-13. Second, the court determines whether the evidence is admissible under Rule 403 by weighing the probative value of the evidence versus its prejudicial effect. *Id.* at 913-14; *see also United States v. Simmons*, 470 F.3d 1115, 1125 (5th Cir. 2006) (internal quotations and citations omitted).

Evid. 608(b). This court has explained that "[t]he application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's *general character for truthfulness.*" *United States v. Opager,* 589 F.2d 799, 801 (5th Cir. 1979) (emphasis added). This court continued, "[w]e consider Rule 608(b) to be inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue. So long as otherwise competent, such evidence is admissible." *Id.* at 802. This court reasoned:

> "We believe that the ultimate purpose of the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence. Individual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude. . . . " Similarly, we believe that Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case.

Id. at 802-03 (quoting *United States v. Batts,* 558 F.2d 513, 517 (9th Cir. 1977), *opinion withdrawn and aff'd on other grounds,* 573 F.2d 599 (1978)). Thus, because this evidence is not being offered to establish that Jacobs has a general character for untruthfulness,

Rule 608(b) does not bar its admissibility. Moreover, the Supreme Court has held that even if evidence is barred under Rule 608(b), it nonetheless may be admissible if it tends to show bias. *United States v. Abel,* 469 U.S. 45, 56 (1984); *see also United States v. Martinez,* 962 F.2d 1161, 1165 (5th Cir. 1992) ("Extrinsic evidence may . . . be admissible for another purpose – for example, if it tends to show bias in favor of or against a party."). As the Supreme Court explained, "it would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness is a liar [under Rule 608(b)]." *Id.*

In short, we find that the evidence relating to the allegations that Jacobs stole funds from Jolt and lied to the IRS tends to show that he has a motive to lie in this case and should have been considered and evaluated as evidence of bias. The Supreme Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right to cross examination." *Davis,* 415 U.S. at 316-17. The Supreme Court has also recognized that "proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Abel,* 469 U.S. at 52. In fact, this court has stated that "cross-examination into any motivation or incentive a witness may have for falsifying his testimony *must* be

permitted." *United States v. Bratton,* 875 F.2d 439, 443 (5th Cir. 1989) (quoting *United States v. Hall,* 653 F.2d 1002, 1008 (5th Cir. 1981)) (emphasis in original).

The admissibility of bias evidence, however, is subject to Rule 403. Thus, the probative value of admitting such evidence must not be substantially outweighed by any prejudicial effect. *Id.* In this respect, district courts retain wide discretion in "impos[ing] reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take into account of such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant.'" *Olden v. Kentucky,* 488 U.S. 227, 232 (1988) (quoting *Van Arsdall,* 475 U.S. at 679); *see also United States v. Lamp,* 779 F.2d 1088, 1095 (5th Cir. 1986). Within this discretion, however, "[c]ounsel should be allowed great latitude in cross examining a witness regarding his motivation or incentive to falsify testimony, and this is especially so when cross examining an accomplice or a person cooperating with the Government." *United States v. Landerman,* 109 F.3d 1053, 1063 (5th Cir. 1997) (citing *United States v. Hall,* 653 F.2d 1002, 1008 (5th Cir. 1981)).

Here, the district court recognized that the evidence at issue is subject to Rule 403 and concluded:

> I will give you [defense counsel] some leeway, but there will not – you can preserve your record on other things that you might want to go into outside the presence of the jury. But we're not going to try Mr. Jacobs. This is Mr. Skelton's trial. Certainly, he is entitled to a fair defense and due process, and I'm going to give him that. But we're not going to try the case of whether Mr. Jacobs did or did not steal money back in the 1990's. You're going to have some limited exploration of that, and then we're going to move on.

At trial, although Skelton was not permitted to introduce extrinsic evidence that Jacobs actually stole money from Jolt and lied to the IRS, he was permitted to explore Jacobs' dealings with Jolt and was specifically permitted to ask if he was only testifying because of the allegations concerning the IRS. He was also permitted to ask Jacobs if he was lying in order to protect himself and whether he had received any assurances from the Government that he would not be prosecuted for his alleged misdeeds. Thus, we conclude that the district court did not err in limiting Skelton's cross-examination because it still gave Skelton ample room to explore the issue of bias. Nor do we find that these limitations give rise to a Confrontation Clause violation given that Skelton was nonetheless "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Restivo,* 8 F.3d at 278 (quoting *Davis,* 415 U.S. at 318). Even if we did find a

Confrontation Clause violation, any such error was harmless beyond a reasonable doubt. Indeed, although Jacobs was a key witness, his testimony that Skelton threatened to shoot him was corroborated by Lujan and Skelton was given ample room to explore the issue of bias and otherwise attack the credibility of Jacobs. *See Kittelson,* 426 F.3d at 319 (citing *Van Arsdall,* 475 U.S. at 684).

B. Cross-Examination of Rebuttal Character Witnesses

The second issue raised by Skelton is whether the district court erred in denying him an opportunity to ask specific "did you know" and "have you heard" questions during cross-examination of the Government's rebuttal character witnesses under Rule 608(b). As quoted in part earlier, that Rule provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Fed. R. Evid. 608(b). According to this court, Rule 608(b) "permit[s] inquiry on cross examination into specific instances of conduct which may bear on a witness' credibility in order to impeach the credibility of the witness." *United States v. Farias-Farias,* 925 F.2d 805, 809 (5th Cir. 1991); *see also United States v. Tomblin,* 46 F.3d 1369, 1389 (5th Cir. 1995) (quoting *United States v. Leake,* 642 F.2d 715, 718 (4th Cir. 1981) ("Rule 608 authorizes inquiry only into instances of misconduct that are 'clearly probative of truthfulness or untruthfulness,' such as perjury, fraud, swindling, forgery, bribery, and embezzlement."). In order for an alleged bad act to be admissible under Rule 608(b), "[f]irst, the alleged bad act must have a basis in fact and second, the incidents inquired about must be relevant to the character traits at issue in the trial." *United States v. Nixon,* 777 F.2d 958, 970 (5th Cir. 1985) (citing *Michelson v. United States,* 335 U.S. 469, 481 n.18 (1948); *United States v. Crippen,* 570 F.2d 535, 538-39 (5th Cir. 1978)). "That does not mean that the basis in fact must be proved as a fact before a good faith inquiry can be made." *Id.* (citing *United States v. Bright,* 588 F.2d 504, 512 (5th Cir. 1979)). The district court has substantial discretion in determining the admissibility of impeachment evidence under Rule 608(b). *Farias-Farias,* 925 F.2d at 809. Finally, even if character evidence is deemed admissible under Rule 608(b), its admissibility is subject to Rule 403. *Id.; see also United States v. Williams,* 822 F.2d 512, 517 (5th Cir. 1987) ("The district court may under Rule 608(b) determine if evidence is probative of truthfulness,

and under Rule 403 exclude even probative evidence if the prejudicial effect outweighs the probative value.").

Here, the district court stated that Rule 608(b), when read in conjunction with Rules 404 and 405, applies differently to third-party witnesses, implying that Rule 608(b) somehow bars Skelton from inquiring into specific instances of conduct to test the reliability of the Government's rebuttal character witnesses. In doing so, the district court erred. This court has explained that "[o]nce a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony." *United States v. Wells,* 525 F.2d 974, 976 (5th Cir. 1976) (citing *Michelson,* 335 U.S. at 479); *see also Bright,* 588 F.2d at 511-12. We see no reason why this Rule would apply differently to rebuttal character witnesses testifying about the character of other third-party witnesses. Indeed, three major treatises on evidence agree that Rule 608(b) permits a party to inquire into specific instances of conduct to test the reliability of a rebuttal character witness in such situations. *See* 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 608.23, at 68 (2d ed. 2007); 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:41, at 266-68 (3d ed. 2007) ("The propriety of asking such probing questions is settled."); 2 Michael H. Graham, Handbook of

Federal Evidence § 608.5. at 622-25 (6th ed. 2006). As the third treatise explained:

> The character witness may be asked not only concerning the specific acts of the principal witness probative of truthfulness or untruthfulness, but may be cross-examined concerning familiarity with convictions as well as arrests, rumors, reports, indictments, etc., of the principal witness. Such facts have a natural bearing upon the reputation of the principal witness and the character witness' opinion of the principal witness. Lack of familiarity with such facts is relevant to an assessment of the basis for the character witness' testimony. Familiarity with such matters explores the character witness' standard of "truthfulness" or "untruthfulness." Whatever the form of the question, the cross-examiner must, of course, have a good faith basis supporting his inquiry.

Handbook of Federal Evidence § 608.5, at 622-25.

To be clear, we reiterate that Rule 608(b) permits "did you know" or "have you heard" questions regarding specific instances of conduct of the principal witness probative of truthfulness or untruthfulness to impeach the credibility of a rebuttal character witness, subject to Rule 403. Having concluded otherwise, the district court erred. Nonetheless, this court has held that although Rule 608 permits the impeachment of the general credibility of a witness, there is no constitutional right to do so. *See Cloud v. Thomas,* 627 F.2d 742, 743-44 (5th Cir. 1980). Thus,

based on this court's precedent, the district court's error does not implicate the Confrontation Clause.[7]

C. Jury Instructions and Response to Jury Question

The third and final issue raised by Skelton is whether the district court abused its discretion by denying his proposed jury instruction that in order for the jury to find Skelton guilty, it must find beyond a reasonable doubt that he threatened to shoot Jacobs. When overruling a proposed jury instruction, "[a] court commits reversible error where (1) the requested instruction is substantially correct; (2) the requested issue is not substantially covered in the charge; and (3) the instruction 'concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.'" *United States v. John,* 309

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[7] Skelton also argues that the district court's evidentiary rulings violated his right to present a complete defense. The Supreme Court has stated that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)). For the same reasons we find no violation of Skelton's confrontation right, we likewise conclude that the district court's evidentiary rulings provided Skelton with a meaningful opportunity to present a complete defense and that any error is harmless beyond a reasonable doubt.

F.3d 298, 304 (5th Cir. 2002) (quoting *United States v. Grissom,* 645 F.2d 461, 464 (5th Cir. 1981)).

In discussing the elements of the offense charged in the indictment, the district court instructed the jury that in order to find Skelton guilty, it must find beyond a reasonable doubt "[t]hat the defendant knowingly transmitted a communication containing a threat to injure the person of another, as charged in Count One of the indictment." The district court also gave the following instruction:

> You will note that the indictment charges that the offense was committed on or about a specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date stated in the indictment.

Skelton requested that the district court instead instruct the jury that in order to find him guilty, it must find beyond a reasonable doubt "[t]hat on February 24, 2006, John Skelton knowingly transmitted a telephone communication containing a threat to shoot Terry Lee Jacobs."

Skelton does not dispute that the district court's instructions closely track the Fifth Circuit Pattern Jury Instructions. Nor does he dispute that they constitute a correct statement of the law. Thus, it can hardly be said that the district court abused its

discretion in overruling Skelton's proposed jury instruction. *See United States v. Turner,* 960 F.2d 461, 464 (5th Cir. 1992) (holding that district court did not err in giving instruction that tracked Fifth Circuit Pattern Jury Instructions and was correct statement of law). The thrust of Skelton's argument is that by not giving a specific date and not specifying an actual threat to shoot in the instructions, the jury could have found Skelton guilty for other alleged threats not charged in the indictment such as his statement in a subsequent phone call, "I'm gonna deal with your [Jacobs'] ass, boy." We reject this argument. The district court's instructions state that in order to find Skelton guilty, the Government must establish beyond a reasonable doubt that Skelton "knowingly transmitted a communication containing a threat to injure the person of another, *as charged in Count One of the indictment.*"(emphasis added). As quoted in the instructions, the indictment states, in pertinent part:

> On or about February 24, 2006 . . . the Defendant, John C. Skelton, knowingly and with intent to extort the sum of $300,000.00 from Terry Lee Jacobs, did transmit in interstate commerce from Arkansas to Texas, a telephone communication to the said Terry Lee Jacobs, which telephone communication contained a threat to injure the person of Terry Lee Jacobs, that is, *a threat to shoot him,* in violation of Title 18 United States Code, Section 875(b).

(emphasis added). Based on these instructions, we presume that the jury only considered the offense

charged in the indictment, which clearly charges Skelton with threatening to shoot Jacobs on or about February 24, 2006. *See United States v. Levine,* 80 F.3d 129, 136 (5th Cir. 1996) ("The jury is presumed to have followed the court's instructions."). Moreover, Skelton emphasized throughout trial that the Government had to prove that he threatened to shoot Jacobs. Accordingly, Skelton can hardly argue "that the failure to give [the proposed instruction] seriously impaired [his] ability to effectively present a given defense." *John,* 309 F.3d at 304 (quoting *Grissom,* 645 F.2d at 464).

Skelton also argues that the district court erred in answering the following jury question, "[a]ccording to 18, U.S.C., Section 875(b), does 'threat to injure a person' mean we have to believe beyond a reasonable doubt that there was a threat to shoot or physical injury in general?" The district court submitted the following response, "you are referred back to the Court's Instructions to the Jury." Again, those instructions closely track the Fifth Circuit Pattern Jury Instructions, are correct statements of the law, and limited the jury's consideration to the offense charged in the indictment, which specified that the threat at issue was a threat to shoot. Because juries are presumed to follow the district court's instructions and district courts are given wide latitude to respond to jury questions, *see United States v. Stevens,* 38 F.3d 167, 170 (5th Cir. 1994) (citing *United States v. Duvall,* 846 F.2d 966, 977 (5th Cir. 1988)), we conclude

that the district court did not abuse its discretion in answering the jury question.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment of conviction and sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51528

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN C. SKELTON

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Midland

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Mar. 7, 2008)

(Opinion 1/17/08, 5 Cir., ___, ___ F.3d ___)

Before KING, BARKSDALE and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court

be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James Dennis
United States Circuit Judge